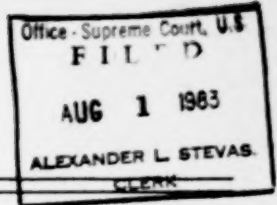


No. 82-6848



IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

LUIS TORRES-VALENCIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred in declining to give petitioner's proposed instruction on character witness testimony, and, if so, whether the error was harmless beyond a reasonable doubt.

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OPINION BELOW

The memorandum opinion of the court of appeals (Pet. App. 1-2) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 1983. The petition for a writ of certiorari was filed on May 31, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of California, petitioner was convicted on one count of conspiracy to possess heroin with intent to distribute it, in violation of 21 U.S.C. 846 (Count 1), and two counts of possession of heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Counts 2 and 4). He was

sentenced to concurrent terms of three years' imprisonment on each count, to be followed by a five-year special parole term on Counts 2 and 4. The court of appeals affirmed (Pet. App. 1-2).

1. The evidence at trial showed that on April 14, 1982, DEA Agent Antonio Loya arranged a meeting in San Jose, California, between an informant equipped with a body transmitter and two sellers of heroin, Carlos Rojas and Gevarado Flore-Macias (Tr. 17-20). During the conversation, one seller said that they were selling heroin at \$13,000 an ounce. The other seller explained that a third person was the source of the drug, but he assured the informant that he could provide whatever quantity of heroin the informant needed (Tr. 120-122).

The next day, Agent Loya, posing as a heroin dealer, met with the informant, Rojas and Flores-Macias at the informant's motel room in West Sacramento (Tr. 27-28). The agent indicated that he wanted to buy 8 to 10 ounces of heroin and offered \$1000 to cover the sellers' travel expenses. Flores-Macias agreed to travel to Los Angeles to pick up the heroin from his source, and then return with it (Tr. 29-30).

On April 20, two DEA agents saw petitioner and Flores-Macias drive a Ford Granada into a parking lot near the informant's motel where they met with Rojas who was driving a red pick up truck (Tr. 131-132). Thereafter, while petitioner and Rojas waited in Rojas' truck, Flores-Macias entered the Ford Granada briefly and then walked across the street to the informant's room (Tr. 133-134). After Flores-Macias left the motel, the informant showed a DEA agent the sample of heroin he had just received (Tr. 32-33).

Later that afternoon, petitioner drove the Ford Granada to a nearby residential area where he opened the back door and appeared to be "rearranging something behind the driver's seat" (Tr. 140). Petitioner then returned to the motel and went into Rojas' room, which was adjacent to the informant's (Tr. 139-

141). Within a few minutes, Flores-Macias, carrying a paper bag, entered the informant's room (Tr. 186-187). The informant and Flores-Macias then walked to a nearby parking lot to deliver the remaining heroin--five ounces--to Agent Loya (Tr. 142, 187). Petitioner was arrested shortly thereafter in Rojas' motel room (Tr. 188).

2. Petitioner testified in his own defense and admitted driving his car to the motel where the heroin sale took place, but denied being involved in any narcotics transaction (Tr. 258). Petitioner also presented three friends as character witnesses. All three witnesses testified without objection that they had never known petitioner to use any drugs or narcotics, or to talk about the sale of narcotics. In addition, they stated that to their knowledge petitioner had not committed any crimes; nor was he the "type of person" who would be involved in selling heroin (Tr. 231-234, 240-242, 293-297).

Prior to closing arguments, appellant submitted two proposed character witness instructions. The district court rejected both of them because they were "keyed to evidence of reputation for certain character traits * * * [and] there was no reputation evidence offered" (Tr. 322). Petitioner then offered the following proposed instruction (Tr. 324-325):

Evidence of a defendant's character, inconsistent with those traits of character ordinarily involved in the commission of the crime charged may give rise to a reasonable doubt, since the jury may think it improbable that a person of good character in respect to those traits would commit such a crime.

The jury should consider such evidence along with all other evidence in the case.

The jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

The district court rejected the instruction because "[c]haracter evidence was not offered in a form that would be receivable.

* * * All that was offered was [sic] the opinions of, as I

recall, two or three witnesses who said that they knew him to be a law abiding citizen, in their opinion, and not the kind of person who would commit a crime as the one charged here. * * * I don't feel that a character evidence instruction is appropriate under these circumstances" (Tr. 326). Since the evidence had been admitted, however, the court allowed petitioner's counsel in closing argument to argue that the character witness testimony could create a reasonable doubt as to whether petitioner committed the crimes charged (Tr. 326, 387).

The court of appeals affirmed (Pet. App. 1-2). It held that petitioner's instructions were not proper in light of the evidence adduced at trial and that the district court's failure to give the specific instruction had not precluded petitioner from presenting his theory to the jury (*ibid.*).

ARGUMENT

Petitioner contends (Pet. 5-7) that the district court improperly refused to give his requested instruction on character evidence and that such an error was not harmless. In the circumstances of this case, however, the court of appeals properly found that the failure to give the instruction was harmless error.

It is well-settled that evidence of good character can create a reasonable doubt as to whether the defendant committed a crime. See 2 Weinstein, Evidence 1981 ¶ 404 [05]; Michaelson v. United States, 335 U.S. 469 (1948); Edgington v. United States, 164 U.S. 361, 366 (1896). In addition, contrary to the district court's conclusion, character evidence may now be offered in the form of an opinion, as well as by testimony regarding the defendant's reputation in the community. See Fed. R. Evid. 405; 2 Weinstein, *supra*, at ¶ 405 [03]. Accordingly, petitioner's evidence was admissible. Since petitioner's proposed instruction correctly stated the rule of law and there was admissible character evidence, petitioner was entitled to have his proposed

instruction given. See United States v. Cramer, 447 F.2d 210, 219 (2d Cir. 1971), cert. denied, 404 U.S. 1024 (1972).

Nevertheless, in the circumstances of this case, the court's error was inconsequential. According to government agents, petitioner arrived at the informant's motel with Rojas and Flores-Macias, who had promised the informant that they would get the heroin from their source. Flores-Macias retrieved a heroin sample from the same Ford Granada that petitioner had driven both to the motel and to a residential area nearby. Within minutes of petitioner's return to the motel room, Flores-Macias delivered a paper sack of heroin to the informant. Petitioner testified that he only drove to Rojas' room seeking a loan and never left the room to drive the Granada. Thus, the crucial issue in the case was who--petitioner or the agents--was telling the truth. The jury obviously credited the agents' testimony.

Moreover, the court permitted petitioner to argue that the evidence regarding his good character by itself could be enough to create a reasonable doubt, and petitioner's counsel emphasized that as a basis for acquittal (Tr. 387-388). The district court instructed the jury that it should carefully examine all the testimony, that it should draw any reasonable inferences it felt were justified in the light of experience, and, of course, that the government had to prove petitioner's guilt beyond a reasonable doubt (Tr. 455-457). Accordingly, it is reasonable to assume that the jury simply was not persuaded by petitioner's very general character evidence. In these circumstances, the failure to give a specific character evidence instruction was harmless. Compare United States v. Cramer, *supra*, 447 F.2d at 219. See also Connecticut v. Johnson, No. 81-927 (February 23, 1983) slip op. 8; Chapman v. California, 386 U.S. 18, 24 (1967). In any event, the issue was considered by the court of appeals, and will affect no one except petitioner. It therefore does not warrant further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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AUGUST 1983